Attorney Docket No.
GRA31 P-303

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Art Unit	: 1761
Examiner	: Helen F. Pratt
Appellants	: Nirmal K. Sinha et al.
Appln No.	: 10/624,225
Filing Date	: July 22, 2003
Confirmation No.	: 6962
For	: PROCESS FOR CONVERTING BRINED SWEET CHERRIES INTO SWEETENED DRIED RED TART CHERRY-LIKE PRODUCTS AND STABILIZED BLACK CHERRY-LIKE PRODUCTS

APPEAL BRIEF (37 CRF § 41.37)

This brief is in furtherance of the Notice of Appeal filed in this case on May 14, 2007.

The fee required under § 41.20(b) (2) is enclosed. If any additional fee is required, Appellants ask that the fee be charged to deposit Account 16-2463.

This brief contains these items under the following headings, and in the order set forth below (37 CFR § 41.37(c) (1)):

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I. Real Party in Interest

The real party in interest in this application is Graceland Fruit, Inc.

II. Related Appeals and Interferences

Appellants are aware of no appeals or interferences that would directly effect or be directly effected by, or have any bearing on, the Board's decision in the pending appeal.

III. Status of the Claims

This is an appeal from a final rejection of claims 1-26 of the above-identified application. Of the claims that have been or are currently presented in the application, Claims 1-26 are presently rejected. Claims 1-26 as last amended and entered are attached hereto in the Claims Appendix. On August 14, 2007, Appellants filed amendments to the claims under 37 CFR § 41.33(a). These amendments changed one claim to be consistent with the disclosure and the specification. Both the claim amended and the changes to the specification do not add new matter. The material added to the specification was present in the claims as originally filed.

VI. Status of Amendments

Except for the Amendment filed on August 14, 2007, all of the Amendments filed in the application have been entered. The August 14, 2007, amendment amended claim 21 and amended the specification to place it in better condition for appeal. This Amendment has not been formally entered.

V. Summary of Claimed Subject Matter

A. Independent Claim 1

Independent claim 1 defines a process for making a value added fruit product comprising the steps of:

1. providing brined cherries;
2. freezing the cherries in water for about 12 to about 72 hours;
3. rinsing the cherries to remove sulfur to less than 50 ppm; and
4. infusing the rinsed cherries to from about 45 Brix to about 55 Brix using an infusion bath comprising cherry juice.

Applicant believes the most pertinent description in the application pertaining to the subject of independent claim 1 appears in paragraphs **[0008]** through **[0010]**.

The step of "providing brined cherries" is disclosed at paragraphs **[0009]** on page 2, line 15 and **[0010]** on page 2, line 24; paragraph **[0011]**, lines 6-9; paragraph **[0013]**, page 3, lines 21-23; and elsewhere in the Specification.

The step of "freezing the cherries in water for about 12 to about 72 hours" is disclosed throughout the Specification, including at paragraph **[0009]**, page 2, lines 17-18; paragraph **[0010]**, page 2 lines 26-27; paragraph **[0013]**, page 3, lines 25-26.

The step of "rinsing the cherries to remove sulfur to less than 50 ppm" is disclosed in various places throughout the Specification, but in particular in paragraph **[0009]** at page 2, lines 19-20 and paragraph **[0010]**, page 2, lines 28-29 as well as paragraph **[0013]**, page 3, lines 29-30.

The step of infusing the rinsed cherries to from about 45 Brix to about 55 Brix using an infusion bath comprising cherry juice is disclosed at least at paragraph **[0009]** on page 2, lines 20-21.

B. Independent Claim 17.

Independent claim 17 defines a process for making a value added fruit product comprising the steps of:

1. providing brined cherries;
2. freezing the cherries in water for about 12 to about 72 hours;
3. rinsing the cherries to remove sulfur to less than 50 ppm; and
4. coloring and infusing the cherries using a bath, comprising of a red cabbage juice extract and caramel color dissolved in a corn syrup;
5. stabilizing the cherries by increasing the Brix of the cherries to not greater than about 52 Brix by adding a combination of corn syrup and lemon juice to the bath;
6. pasteurizing the cherries by heating and then cooling the cherries;
7. adding a flavorant to the liquid bath as the cherries cool during pasteurization;
8. separating the cherries from the liquid bath; and
9. freezing the cherries.

Appellants submit that the step of "providing brined cherries" is disclosed at paragraphs **[0009]** on page 2, line 15 and **[0010]** on page 2, line 24; paragraph **[0011]**, lines 6-9; paragraph **[0013]**, page 3, lines 21-23; and elsewhere in the Specification.

Appellants submit that the step of "freezing the cherries in water for about 12 to about 72 hours" is disclosed throughout the Specification, including at paragraph **[0009]**, page 2, lines 17-18; paragraph **[0010]**, page 2 lines 26-27; paragraph **[0013]**, page 3, lines 25-26.

Regarding Element 3, the step of rinsing the cherries to remove sulfur to less than 50 ppm, Appellants respectfully submit the Specification discloses this feature throughout, but in particular in paragraph **[0009]** at page 2, lines 19-20 and paragraph **[0010]**, page 2, lines 28-29 as well as paragraph **[0013]**, page 3, lines 29-30.

Regarding Element 4, coloring and infusing the cherries with a combination of red cabbage juice extract and caramel color, this element is shown at page 2, lines 29-30. Applicant's believe that disclosure relating the this element may be found at paragraph **[0018]** at page 6, lines 13-16. The Element is also shown in various other portions of the Specification including Example 3, page 7, lines 9-11.

Regarding Element 5, which requires stabilizing the cherries by increasing the Brix of the cherries to not greater than about 52 Brix by adding a combination of corn syrup and lemon juice to the bath, this Element may be found in the originally filed claim 17 at page 12, lines 19-20 as well as on page 2, line 30 through page 3, line 1. This Element is disclosed in paragraph **[0010]** at page 3, line 1.

Regarding Element 6, which requires pasteurizing the cherries by heating the cherries from about 180°F to about 200°F and then cooling the cherries to at least about

100°F, this element is disclosed in various locations of the Specification, in particular in paragraph **[0010]** at page 3, line 2. This Element is also disclosed at paragraph **[0018]** at page 6, lines 20-23.

Regarding Element 7, adding about 3% natural black sweet cherry flavor, this Element is similarly disclosed in various places of the Specification, in particular at least in paragraph **[0010]** at page 3, line 3; paragraph **[0023]** at page 9, lines 17-18; and paragraph **[0024]** at page 10, lines 11.

Regarding Element 8 separating the cherries from the liquid bath, this Element is disclosed in at least paragraph **[0010]** at page 3, lines 3-4.

Regarding Element 9, measuring the sulfur content to confirm less than about 10 ppm sulfur in the processed cherries is also found in various places of the Specification. This Element is present in paragraph **[0010]** at page 3, lines 3-4 and originally presented claim 23 at page 14, lines 16-17.

C. Independent Claim 21.

Independent Claim 21 is directed toward a process for making a value-added fruit product comprising the steps of:

1. providing brined cherries;
2. freezing the cherries for about 12 to about 72 hours to soften the firm tissue of the brined cherries, wherein the freezing temperature is less than or equal to 0°F;
3. rinsing the cherries to remove sulfur to less than 50 ppm, wherein rinsing comprises soaking the cherries in cold water until the sulfur content of the cherries is less than 50 ppm;

4. infusing the brined cherries with red tart cherry juice to from about 45 to about 70[1] Brix, wherein infusing comprises;

5. soaking the cherries for about 2 hours in a first infusion juice comprising a Brix of about 68;

6. separating the cherries from the first infusion juice and soaking the cherries for about 4 hours in a second infusion juice comprising a Brix of about 68;

7. separating the cherries from the second infusion juice; and

8. drying the cherries for about 2 hours at a temperature of about 180°F.

Appellants respectfully submit that the step of "providing brined cherries" is disclosed at paragraphs **[0009]** on page 2, line 15 and **[0010]** on page 2, line 24; paragraph **[0011]**, lines 6-9; paragraph **[0013]**, page 3, lines 21-23; and elsewhere in the Specification.

Element 2 is disclosed throughout the Specification, including at paragraph **[0009]**, page 2, lines 17-18; paragraph **[0010]**, page 2 lines 26-27; paragraph **[0013]**, page 3, lines 25-26.

Regarding Element 3, rinsing the cherries to remove sulfur to less than 50 ppm, the Specification discloses this feature throughout, but in particular in paragraph **[0009]** at page 2, lines 19-20 and paragraph **[0010]**, page 2, lines 28-29 as well as paragraph **[0013]**, page 3, lines 29-30.

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[1] The proposed Amendment to claim 21 filed simultaneously with this Appeal Brief amends the claim to from about 45 to about 68 Brix.

Element 4, which is infusing the brined cherries with red tart cherry juice to from about 45 Brix to about 68 Brix using an infusion bath comprising cherry juice is disclosed at least at paragraph **[0013]** on page 4, line 2-3.

Appellants respectfully submit that the subject matter of Elements 5-8 may be found at least at paragraph **[0016]** at page 5, lines 7-11.

D. Independent claim 23.

Independent claim 23 defines a process for making a value added fruit product comprising the steps of:

1. providing brined cherries, wherein the cherries are frozen;
2. optionally freezing the cherries for about 12 to about 72 hours to soften the firm tissue of the brined cherries;
3. rinsing the cherries in water to remove sulfur to less than 50 ppm;
4. coloring and infusing the cherries with a composition comprising a combination of from about 1% to about 7% of red cabbage juice extract and caramel color, based on the weight of the cherries, dissolved in high fructose corn syrup by placing the cherries and the composition together to form a first bath;
5. stabilizing the cherries by adding a stabilization syrup comprising a combination of from about 50 to about 80 Brix high fructose corn syrup and about 1% lemon juice, based on the weight of the cherries to the first bath thereby forming a second bath;

6. pasteurizing the cherries by heating the cherries to about 180°F to about 200°F and then cooling the cherries to at least about 100°F;

7. adding about 3% natural black sweet cherry flavor, based on the weight of the cherries;

8. separating the cherries from the second bath wherein the resultant cherries are black sweet cherry products; and

9. measuring the sulfur content to confirm less than 10 ppm sulfur in the processed cherries.

Appellants respectfully submit that the step of "providing brined cherries" is disclosed at paragraphs **[0009]** on page 2, line 15 and **[0010]** on page 2, line 24; paragraph **[0011]**, lines 6-9; paragraph **[0013]**, page 3, lines 21-23; and elsewhere in the Specification.

Element 2 is disclosed throughout the Specification, including at paragraph **[0009]**, page 2, lines 17-18; paragraph **[0010]**, page 2 lines 26-27; paragraph **[0013]**, page 3, lines 25-26.

Regarding Element 3, rinsing the cherries to remove sulfur to less than 50 ppm, the Specification discloses this feature throughout, but in particular in paragraph **[0009]** at page 2, lines 19-20 and paragraph **[0010]**, page 2, lines 28-29 as well as paragraph **[0013]**, page 3, lines 29-30.

Element 4, which is infusing the rinsed cherries to from about 45 Brix to about 55 Brix using an infusion bath comprising cherry juice is disclosed at least at paragraph **[0009]** on page 2, lines 20-21.

Regarding Element 5, stabilizing the cherries by adding a stabilization syrup comprising a combination of from about 50 to about 80 Brix high fructose corn syrup and about 1% lemon juice, based on the weight of the cherries to the first bath thereby forming a second bath, this element was present in originally filed claim 23, page 14, lines 9-11, at paragraph **[0010]** at page 2, line 30 through page 3, line 1, and at page 6, lines 18-19.

Regarding Element 6, pasteurizing the cherries by heating the cherries to about 180°F to about 200°F and then cooling the cherries to at least about 100°F, this element is present in, for example, paragraph **[0019]** at page 7, lines 14-16.

Regarding Element 7, adding about 3% natural black sweet cherry flavor, based on the weight of the cherries, this element is present at, for example, paragraph **[0019]**, page 7, lines 15-16.

Regarding Element 8, separating the cherries from the second bath wherein the resultant cherries are black sweet cherry products, this element is present at, for example, paragraph **[0019]**, page 7, lines 17-18.

Regarding Element 9, measuring the sulfur content to confirm less than 10 ppm sulfur in the processed cherries, this element was present in claim 23 as originally filed at page 14, lines 16-17 and in paragraph **[0010]** in the proposed amended paragraph **[0010]** submitted on the same day as this Appeal Brief.

VI. Grounds of Rejection to be Reviewed on Appeal

Claims 1-26 stand rejected under 35 USC § 103(a) as being unpatentable over Kraut et al. (U.S. Reg. No. H001014) in view of Hirotomo (JP60078536), Kahn et al. (U.S. Pat. No. 4,350,711), Wettlaufer (U.S. Pat. No. 6,479,092), Phillips (U.S. Pat. No. 6,254,919) and further in view of Rejimbal Jr. et al. (U.S. Pat. No. 5,277,922).

Appellants understand the current rejection as the following:

- claim 1 is rejected under 35 U.S.C. §103(a) as unpatentable over Kraut et al. in view of Hirotomo and Rejimbal et al. (*see* Office Action, par. 3);
- claims 4-7, 12-14, 20, 24 and 26 are rejected under 35 U.S.C. §103(a) as unpatentable over Kraut et al. alone (*see* Office Action, pars. 5, 6, 8, 13, 16 and 17);
- claims 17, 18, 21-23 and 25 are rejected under 35 U.S.C. §103(a) as unpatentable over Kraut et al. in view of Hirotomo, Kahn et al. and Phillips (*see* Office Action, pars. 11, 14 and 15);
- claims 2, 3, 8, 9, 15 and 16 are rejected under 35 U.S.C. §103(a) as unpatentable over Kraut et al. in view of Kahn et al. (*see* Office Action, pars. 4, 7 and 10);
- claims 10 and 11 are rejected under 35 U.S.C §103(a) as unpatentable over Kraut et al. in view of Wettlaufer (*see* Office Action, par. 10); and
- claim 19 is rejected under 35 U.S.C. §103(a) as unpatentable over Kraut et al. in view of Phillips (*see* Office Action, par. 12).

VII. Arguments

A. Claims 1-20, 22 and 25.

An object of the invention of this group of claims is to convert brined cherries, which have low economic value, into value added fruit products, e.g. sweetened, dried, red tart cherry-like products and stabilized black cherry-like products, which are useful in a variety of applications including candies, ice cream, fruit cakes, jams, jellies, etc. Appellants submit there is no cited prior art reference or combination of references, which accomplishes this result.

Appellants submit that the Examiner did not make a *prima facie* case of obviousness because ***even when combined,*** the cited references failed to teach or suggest all the claim limitations. As admitted by the Examiner, Kraut et al. do not teach or suggest freezing the cherries **in water**. (Final Office Action mailed March 14, 2007, at paragraph **[0002]**, page 2). The Examiner continues to maintain it would have been obvious to one or ordinary skill in the art to modify Kraut et al. with the quick freezing step of Hirotomo "because freezing the cherries would prevent pulp damage."

However, there are two problems with the examiner's position:

1. These claims require more than merely freezing the cherries—applicant freezes the cherries "***in water***." Hiromoto does not freeze fruit "in water."

2. Applicant's purpose in freezing the cherries preferably ***in water*** is not to "prevent pulp damage," but rather is to soften the firm tissue of the brined

cherries, facilitate removal of sulfur, facilitate coloring, and aids in the infusion of the cherries to a higher Brix level. (Specification, paragraph **[0009]**).

Hirotomo does not disclose freezing brined cherries (brining is a preservative method) let alone freezing brined cherries in water. In fact, Hirotomo merely discloses raw fruit, which is washed with water, **drained**, and frozen at 0 to 5° Centigrade. The frozen fruit is then immersed in an aqueous a solution of sucrose, glucose or starch syrup or a mixed liquid of sorbitol or maltitol to obtain the objective fruit having a sugar content in the fruit pulp of 30-55%. (See Abstract of Hirotomo). Clearly, the raw fruit is not frozen in water.

Even assuming it was true that it would have been obvious to modify Kraut et al. with the teachings or Hirotomo because freezing the cherries would prevent pulp damage, freezing the cherries in water does not prevent pulp damage to the cherries, nor does applicant want to. As noted at Specification, paragraph **[0009]**, freezing the cherries in water as shown in the various examples, softens the firm tissue of the brined cherries, facilitates removal of sulfur, facilitates coloring, and aids infusion of the cherries to a higher Brix level. Accordingly, the bases for the combination of Kraut et al. and Hirotomo is inconsistent with what actually happens. Clearly, the Examiner's rejection is solely based on hindsight.

The Examiner then relies the Rejimbal Jr. et al. reference to supplement the further combination of Kraut et al. and Hirotomo, because Rejimbal discloses preserving fruit in frozen water. However, Rejimbal Jr. et al. do not disclose freezing the fruit at all,

only the water around the fruit. Nor does Rejimbal freeze the fruit for only about 12 to about 72 hours, as set forth in the claims.

Appellants submit that the Rejimbal '922 patent actually ***teaches away*** from freezing fruit and instead, specifically teaches that the fruit itself should **NOT be frozen**—only the water around it. The '922 patent states:

> . . . . After the fruits **20** are submerged in the holding tank **1**, the refrigeration system chills or freezes the submersion liquid **25**. In the preferred embodiment, **the submersion liquid has a freezing point higher than that of the fruits**. Then, the submersion liquid is brought to a temperature such that the submersion liquid is at or below its freezing temperature **but above the freezing point of the citrus fruits**. For example, in a preferred embodiment in which the submersion liquid is tap water, the water ice temperature is maintained between 29 and 32 degrees F.
>
> (In an alternative embodiment, the submersion liquid may be maintained somewhat above its freezing point, for example, in this alternative embodiment, if the submersion liquid is water, it is maintained at between 33 and 34 degrees F.)

('922 patent, col. 3, lines 14-29) (*emphasis added*).

The above quoted section of the '922 patent is a portion of the Specification cited by the Examiner in support of her conclusion of obviousness. The Examiner also cites the Abstract of the '922 patent, which similarly states:

> . . . . The liquid may either be maintained just above its freezing point or frozen such that the temperature of the liquid is maintained **above the freezing point of the fruits**.

('922 patent, Abstract) (*emphasis added*).

Even the first independent claim of the '922 patent emphasizes the fact that the fruit should not be frozen and that the water the citrus fruit is submerged in should

remain "above the freezing point of the citrus fruits." Accordingly, Appellants respectfully submit that none of the cited references, as applied by the Examiner disclose freezing brined cherries or any other fruit for that matter in water or in water for about 12 to about 72 hours. Even if an artisan combined Kraut et al., Hirotomo, and Rejimbal Jr. et al., one would not practice the claimed invention.

B. Claims 21 and 22.

Claims 21 and 22 require soaking the cherries for about two hours in a first infusion juice comprising a Brix of about 68 and then soaking the cherries for about four hours in a second infusion juice also comprising a Brix of about 68. In addition to relying on Kraut et al., Hirotomo and Rejimbal Jr. et al. as discussed above, the Examiner further relies on U.S. Patent No. 4,350,711 to Kahn et al to reject these claims. The Examiner states:

> . . . . Kraut et al is silent as to infusing the brined cherries with red tart cherry juice. However, Kahn et al teach a method of infusing fruits with food additives including flavoring agents, colorants, etc. Suitable flavorings include caramel, fruit, etc (col 7 lines 58-64). The infusion process maybe [sic] limited to the use of two infusion baths so long as the about 32-55% water-soluble solids content is reached in the fruit (col 4 lines 1-5).
>
> . . . . Kahn et al further teach that the fruit is immersed in the first bath until equilibrium is attained and then immersed in a second bath until equilibrium is attained. Kahn et al is silent as to the period of time this takes. However, it would be expected that the greater the level of Brix in the infusion bath, the lesser the amount of time needed for infusion. **It would be obvious to one of ordinary skill in the art to utilize a high Brix infusion bath for the product to reduce time.**

(March 14, 2007, Office Action at page 7, emphasis added).

However, what the examiner considers obvious—using two consecutive 68 Brix infusion baths-- would require one of ordinary skill in the art to disregard the specific reason Kahn teaches the use of two or more infusion baths. Kahn specifically teaches the use of successive sugar baths of "gradually increasing initial sugar concentration" in order to minimize osmotic shock:

> Reduction in fruit volume loss is minimized by minimizing "osmotic shock". This is accomplished by infusing the fruit by immersing it in at least **two or more sugar containing baths of gradually increasing initial sugar concentration** so that the water soluble solids concentration of the fruit is increased in a step-wise and gradual manner, to the level of about 32-55%. In each bath the sugar solids concentration must be greater than the water soluble solids concentration of the fruit which is to undergo infusion. . . .

('711 patent, col. 3, lines 20-24) (*emphasis added*).

As such, Kahn et al. specifically teach away from the claimed two-step infusion process where the Brix of the infusion liquid is the same relatively high 68 brix level. To the contrary, the '711 patent specifically teaches ***gradually increasing*** initial sugar concentrations in successive infusion baths to avoid osmotic shock. While Kahn might suggest using a final infusion bath at a high Brix level in order to achieve an end point infused fruit sugar concentration of 55%, Kahn clearly teaches the use of lower brix levels in prior infusion baths. Accordingly, for at least these reasons, Appellants submit that the subject matter of claims 21 and 22 would not have been obvious to one of ordinary skill.

C. Claims 23-26.

Initially, Appellants note that the Office Action mailed March 14, 2007 does not specifically reject claim 23 in the body of the Office Action. However, as Appellants understand it, the Examiner has rejected claims 23-26 under 35 USC. §103(a) as unpatentable over Kraut et al. in view of Kahn et al. and Phillips. None of the cited references, alone or in combination, teach or suggest a method for converting brined cherries to black sweet cherry products, let alone a method of doing so using the steps of claim 23, which are reiterated here for convenience:

1. providing brined cherries, wherein the cherries are frozen;

2. optionally freezing the cherries for about 12 to about 72 hours to soften the firm tissue of the brined cherries;

3. rinsing the cherries in water to remove sulfur to less than 50 ppm;

4. coloring and infusing the cherries with a composition comprising a combination of from about 1% to about 7% of red cabbage juice extract and caramel color, based on the weight of the cherries, dissolved in high fructose corn syrup by placing the cherries and the composition together to form a first bath;

5. stabilizing the cherries by adding a stabilization syrup comprising a combination of from about 50 to about 80 Brix high fructose corn syrup and about 1% lemon juice, based

on the weight of the cherries to the first bath thereby forming a second bath;

6. pasteurizing the cherries by heating the cherries to about 180°F to about 200°F and then cooling the cherries to at least about 100°F;

7. adding about 3% natural black sweet cherry flavor, based on the weight of the cherries;

8. separating the cherries from the second bath wherein the resultant cherries are black sweet cherry products; and

9. measuring the sulfur content to confirm less than 10 ppm sulfur in the processed cherries.

Additionally, the Examiner admits that "Kraut et al is silent as to adding lemon juice, however, according to the Examiner, it would be obvious to one of ordinary skill in the art to modify Kraut et al with the teachings of Phillips and Kahn et al by utilizing any flavoring agent such as lemon juice or natural black sweet cherry flavor as recited by applicant." The Examiner also states:

> One of ordinary skill in the art would expect that lemon juice is [sic] inherently functions as a lemon flavorant and therefore it would not involve an inventive step utilizing any flavoring agent such as lemon juice or natural black sweet cherry flavor as recited by applicant. Besides it is unclear how lemon juice is different from a lemon flavorant because they both contain lemon. (Office Action, par. 19).

However, a primary difference between lemon juice and a lemon flavorant is the acidity. (Sinha Decl., ¶ 10). Lemon juice concentrate has a higher acidity than a lemon flavorant. (Sinha Decl., ¶ 10). As stated in Applicants' April 11, 2006, Response, the

addition of lemon juice, as opposed to merely a lemon flavorant, changes the Brix to acidity ratio of the infused cherries such that the infused cherries more closely mimic the natural taste of black sweet cherries. (Sinha Decl., ¶ 11). In the claimed process, lemon juice is added to increase the acidity and not to impart lemon flavor. (Sinha Decl., ¶ 12). Applicants respectfully submit that it is only through hindsight that one of ordinary skill would have been led to add about 1% lemon juice to the stabilization syrup, which is added to a first bath to form a second bath. Lemon juice and lemon flavorant are two different ingredients, each having a specific function. (Sinha Decl., ¶ 11). Accordingly, one of ordinary skill in the art would not have been motivated to modify Kraut et al. with the teachings of Phillips and Kahn et al. by adding any flavoring agent such as lemon juice because a lemon flavor is not desired, instead, a black sweet cherry flavor is desired.

The Examiner, in response the Appellants most recent arguments states that "it is unclear how lemon juice is different from a lemon flavorant because both contain lemon. As discussed above, lemon juice concentrate has higher acidity than a lemon flavorant. Additionally, lemon juice contains vitamins such as vitamin C and a terpene called D-limonene. Moreover, Appellants respectfully submit that Appellants believes the prior art does not disclose the steps of coloring and infusing the cherries with a composition comprising a combination of from about 1% to about 7% of red cabbage juice extract and caramel color based on weight of the cherries, dissolved in a high fructose corn syrup by placing the cherries and the composition together to form a first bath and subsequently stabilizing the cherries by adding a stabilization syrup that includes the combination of from about 50 to about 80 Brix high fructose corn syrup and

about 1% lemon juice based on the weight of the cherries to that first bath to form a second bath. As the Examiner apparently acknowledges that page 8 of the Office Action mailed March 14, 2007, (which Appellants presume is directed toward claim 23), Kahn et al. do teach a method for infusing fruits and that conventional food additives may be added to the post-infusion bath. However, this is the post-infusion bath, i.e. after the sucrose has been infused into the fruit. At this point in the process discussed in the Kahn et al. reference, the fruit product has been removed from the sucrose infusion bath. Appellants submit that the '711 patent is discussing the use of food additives added to the post-infusion bath to presumably add value to the post-infusion bath as a separate commercial product.

There is no disclosure in the '711 patent that suggests utilizing red cabbage juice extract and caramel color dissolved ***in high fructose corn syrup as part of the infusion bath,*** let alone subsequently adding to that first bath a second stabilization syrup that includes the combination of high fructose corn syrup and lemon juice, to form a second infusion bath.

Finally, Appellants submit that it is only through hindsight that the Examiner has come to the conclusion that adding lemon juice to a process for converting brined cherries to black sweet cherry products would be appropriate. Certainly, citric acid is known, but absent a specific teaching, one would merely add citric acid not lemon juice. Why selectively pick lemon juice for a cherry product? It is only through hindsight that this would be appropriate. Were it not hindsight, why would one not, for example, add orange juice or any other citrus based fruit juice?

D. Claim 14.

Additionally, Appellants respectfully submit that the Examiner has not identified why the various combined references disclose a process as defined in claim 14 which adds to claim 1 the following steps:

Claim 7: The process of claim 1 further comprising the step of drying the cherries.

Claim 9: The process of claim 7, wherein the cherries formed by the process comprise a moisture content of from about 9% to about 15%.

Claim 11: The process of claim 9, wherein the cherries formed by the process comprise a water activity of from about 0.4 to about 0.6.

Claim 14: The process of claim 11, wherein the process for making a value-added fruit product consists of the following steps:

providing brined cherries;

freezing the cherries in water for about 12 to about 72 hours;

rinsing the cherries to remove sulfur to less than 50 ppm;

infusing the rinsed cherries to from about 45 Brix to about 55 Brix using an infusion bath comprising cherry juice; and

drying the cherries.

In addition to all of the elements added to claim 14 through claims 7, 9 and 11, the use of the transition phrase "consists of" in claim 14 is a closed transition phrase indicating that the claimed process consists only of the steps added in claim 14. Appellants respectfully submit that this claimed aspect has not been addressed in the latest March 14, 2007 Office Action.

Accordingly, Appellants respectfully submit that claim 14 is allowable for this reason, over and above any reasons discussed above regarding its allowability.

VIII. CONCLUSION

Claims not specifically discussed above are dependent, and as such are allowable with the claims from which they depend which have been discussed. *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988). For the reasons set forth above, and as is apparent from examining the invention defined by claims 1-26, when properly considering the cited references, these claims define patentable subject matter. Accordingly, reversal of the rejection of these claims under 35 USC § 103 is appropriate and respectfully solicited.

Respectfully submitted,

August 14, 2007
Date

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IX. Claims Appendix (37 CFR § 41.37(c)(1)(viii))

Claim 1: A process for making a value-added fruit product comprising the steps of:

providing brined cherries;

freezing the cherries in water for about 12 to about 72 hours;

rinsing the cherries to remove sulfur to less than 50 ppm; and

infusing the rinsed cherries to from about 45 Brix to about 55 Brix using an infusion bath comprising cherry juice.

Claim 2: The process of claim 1, wherein the temperature of the cherry juice is from about 70°F to about 120°F.

Claim 3: The process of claim 2, wherein the cherry juice comprises a red tart cherry juice.

Claim 4: The process of claim 3 further comprising the step of drying the cherries.

Claim 5: The process of claim 4, wherein the product produced by the process comprises less than about 10 ppm sulfur.

Claim 6: The process of claim 1, wherein the product produced by the process comprises less than about 10 ppm sulfur.

Claim 7: The process of claim 1 further comprising the step of drying the cherries.

Claim 8: The process of claim 5, wherein the cherries formed by the process comprise a moisture content of from about 9% to about 15%.

Claim 9: The process of claim 7, wherein the cherries formed by the process comprise a moisture content of from about 9% to about 15%.

Claim 10: The process of claim 8, wherein the cherries formed by the process comprise a water activity of from about 0.4 to about 0.6.

Claim 11: The process of claim 9, wherein the cherries formed by the process comprise a water activity of from about 0.4 to about 0.6.

Claim 12: The process of claim 1, wherein the rinsed cherries are infused for from about 6 to about 15 hours and the process for making a value-added fruit is completed in about one week or less.

Claim 13: The process of claim 10, wherein rinsed cherries are infused for from about 6 to about 15 hours and the process for making a value-added fruit is completed in about one week or less.

Claim 14: The process of claim 11, wherein the process for making a value-added fruit product consists of the following steps:

providing brined cherries;

freezing the cherries in water for about 12 to about 72 hours;

rinsing the cherries to remove sulfur to less than 50 ppm;

infusing the rinsed cherries to from about 45 Brix to about 55 Brix using an infusion bath comprising cherry juice; and

drying the cherries.

Claim 15: The value-added fruit product produced according to the process of claim 1.

Claim 16: The value-added fruit product produced according to claim 14.

Claim 17: A process for making a value-added fruit product comprising the steps of:

providing brined cherries;

freezing the cherries in a water bath for from about 12 to about 72 hours;

rinsing the cherries to remove sulfur to less than about 50 ppm;

coloring and infusing the cherries using a bath, comprising of a red cabbage juice extract and caramel color dissolved in a corn syrup;

stabilizing the cherries by increasing the Brix of the cherries to not greater than about
52 Brix by adding a combination of corn syrup and lemon juice to the bath;

pasteurizing the cherries by heating and then cooling the cherries;

adding a flavorant to the liquid bath as the cherries cool during pasteurization;

separating the cherries from the liquid bath; and

freezing the cherries.

Claim 18: The process of claim 17, wherein the flavorant comprises a natural black sweet cherry flavor.

Claim 19: The process of claim 18, wherein the cherries are pasteurized to a controlled temperature of from about 180°F to about 200°F and subsequently cooled to a temperature of from about 80°F to about 90°F.

Claim 20: The process of claim 19, wherein the natural black sweet cherry flavorant is added to the liquid bath while the liquid bath is cooling after pasteurization when the temperature of the liquid bath is not more than about 110°F.

Claim 21: A process for making a value-added fruit product comprising the steps of:

providing brined cherries;

freezing the cherries for about 12 to about 72 hours to soften the firm tissue of the brined cherries, wherein the freezing temperature is less than or equal to 0°F;

rinsing the cherries to remove sulfur to less than about 50 ppm, wherein rinsing comprises soaking the cherries in cold water until the sulfur content of the cherries is less than 50 ppm; and infusing the brined cherries with red tart cherry juice to from about 45 to about 70 Brix, wherein infusing comprises;

soaking the cherries for about 2 hours in a first infusion juice comprising a Brix of about 68;

separating the cherries from the first infusion juice and soaking the cherries for about 4 hours in a second infusion juice comprising a Brix of about 68;

separating the cherries from the second infusion juice; and drying the cherries for about 2 hours at a temperature of about 180°F.

Claim 22: The process of claim 21, wherein freezing the cherries comprises freezing the cherries in water.

Claim 23: A process for converting brined cherries to black sweet cherry products comprising the steps of:

providing brined cherries, wherein the cherries are frozen;

optionally freezing the cherries for about 12 to about 72 hours to soften the firm tissue of the brined cherries;

rinsing the cherries in water to remove sulfur to less than about 50 ppm;

coloring and infusing the cherries with a composition comprising a combination of from about 1% to about 7% of red cabbage juice extract and caramel color, based on the weight of the cherries, dissolved in high fructose corn syrup by placing the cherries and the composition together to form a first bath;

stabilizing the cherries by adding a stabilization syrup comprising a combination of from about 50 to about 80 Brix high fructose corn syrup and about 1% lemon juice, based on the weight of the cherries to the first bath thereby forming a second bath;

pasteurizing the cherries by heating the cherries to about 180°F to about 200°F and then cooling the cherries to at least about 100°F;

adding about 3% natural black sweet cherry flavor, based on the weight of the cherries;

separating the cherries from the second bath wherein the resultant cherries are black sweet cherry products; and

measuring the sulfur content to confirm less than about 10 ppm sulfur in the processed cherries.

Claim 24: The process of claim 23 further comprising the step of freezing the processed cherries.

Claim 25: The process of claim 23, wherein the cherries are frozen in water prior to coloring and infusing the cherries.

Claim 26: The process of claim 23, wherein the brined cherries comprise brined cherries chosen from the group comprising single bleached whole cherries, double

bleached whole cherries, and single bleached sliced cherries, double bleached sliced cherries, or mixtures thereof.

X. Evidence Appendix (37 CFR § 41.37(c)(1)(ix))

The evidence submitted during this application under 37 CFR §§ 1.130, 1.131 or 1,132 or any evidence entered by the Examiner and relied upon by Appellants in the appeal includes:

1. Declaration of Nirmal K. Sinha filed on October 19, 2006.

XI. Related Proceedings Appendix (37 CFR § 41.37(c)(1)(x))

Appellants are aware of no related proceedings.